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See end of opinion for appendix

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DVAUGHN CORTEZ HILL, Defendant and Appellant.	A154192 (Solano County Super. Ct. No. FCR321233)

Dvaughn Cortez Hill appeals his conviction for the attempted murder of Dennis Keesee. Hill contends that there is no substantial evidence that, when he shot Keesee, he was not acting in the heat of passion, or in imperfect self-defense. He also argues that instructional errors, exacerbated by prosecutorial misconduct, left the jury unable to properly evaluate the evidence of his state of mind. We conclude that the evidence was sufficient to permit the jury to find that Hill did not act in the heat of passion, or in a sincere but unreasonable belief that he was defending himself. Hill's other arguments also lack merit and fail to show prejudice. We affirm the conviction.

Factual and Procedural History

In April 2016, friends told Hill that two men, Vanning Johnson and Monty B, were "going to get him." On May 2, 2016, Hill had a gun in his waistband when he stopped at a liquor store in a strip mall on North Texas Street in Fairfield. The parking lot there has two rows of parking spaces between the storefronts and Texas Street. Hill parked his white Lexus in the row of spaces further from the store. A pickup truck was parked in the front row of spaces, in which Keesee was sitting, waiting for his laundry to

dry in a laundromat by the liquor store. Hill and Keesee were complete strangers. The liquor store's video cameras clearly recorded the ensuing events.

Inside, Hill brought a soft drink to the counter, and spent some 90 seconds selecting items behind the counter and paying. As he did so, Johnson walked past the store, passing from left to right (as seen from inside) and looking into the store. Hill glanced out the window, made eye contact with Johnson, turned briefly back to the counter, then did a double take and watched Johnson walk by. Hill testified that he saw a bulge in Johnson's pocket that could be a gun, and feared Johnson would enter the store and shoot him unless he acted.

Hill walked toward the front door of the store, pausing several times while looking out in the direction in which Johnson had passed. The door opens to the right, the direction in which Johnson had passed. Keesee's truck was parked a few feet to the right of the liquor store's door (as seen from inside the store). As Hill watched, Johnson walked to the end of the sidewalk in front of the storefronts, paused, then turned and walked away from the storefronts, looking over his shoulder toward the liquor store. As Johnson stepped from the sidewalk to an adjacent concrete island, Hill reached the door of the liquor store and drew his gun. At the same time, Keesee fortuitously opened the door of his truck and began to get out of the truck.

Hill pushed open the door of the liquor store and began firing at Johnson while walking slowly toward him. Johnson ran from him, beyond the concrete island. Keesee stood outside his truck with the front door still open, watching Johnson. The first of three frames of video from the store's external cameras, attached as an appendix to this opinion, shows the men's positions after Hill opened fire.

Hill continued to walk toward Johnson, firing his gun, until he stood directly in front of Keesee's truck. Hill fired 14 shots. Johnson, hit by several shots, fell briefly to his knees as his gun dropped from his pocket. He quickly spun to a seated position on the asphalt, facing Hill (and Keesee), grabbed the gun, and began to fire back at Hill, grazing him with two bullets.

At that point, Hill and Keesee each turned and ran from Johnson. Hill ran along the passenger side of Keesee's truck toward his car. Keesee ran back along the driver's side of his truck. As he turned behind the truck, away from Johnson, he unwittingly ran towards Hill. As shown in the second frame of video, the two men emerged from either side of the truck on a collision course. When Hill unexpectedly confronted Keesee, he raised his gun, veered away from Keesee, and fired a single shot into Keesee's torso from close range, as shown in the third frame of video.

The shot nicked one of Keesee's vertebrae, and he fell instantly to the ground. Hill kept running towards his car. He spent more than 20 seconds fumbling for his keys and getting in the car while Keesee—unable to stand—rolled out of the car's path. Hill then drove away.

Johnson and Keesee survived their injuries. Hill was tried on two counts of attempted murder (Pen. Code, §§ 664, 187), and the jury was charged as well on the lesser included offenses of attempted voluntary manslaughter. Hill testified in support of his claimed perfect or imperfect self-defense and heat of passion. As to Johnson, the jury found Hill not guilty of attempted murder but guilty of attempted voluntary manslaughter; as to Keesee, the jury found Hill guilty of attempted murder. The jury also found true as to both offenses firearm and great bodily injury enhancements (Pen. Code, §§ 12022.53, subds. (b), (c), (d), 12022.7, subd. (a)). The court sentenced Hill to three years, four months in prison for attempted voluntary manslaughter, consecutive to a term of thirty-two years to life for attempted murder.

Hill has timely appealed, challenging only his conviction for attempted murder.

Discussion

The crime of attempted murder requires a specific intent to kill, i.e., express malice. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*); *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1138.) "Express malice requires a showing that the assailant ' " ' either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' " ' " (*Smith, supra,* at p. 739.) A person does not act with malice if he sincerely but unreasonably believes in a need to defend himself from the person he tries

to kill, or acts in the heat of a passion resulting from provocation he reasonably attributes to the victim. (*People v. Rios* (2000) 23 Cal.4th 450, 460.)

" 'No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' " ' " other than revenge, including fear. (*People v. Millbrook*, *supra*, 222 Cal.App.4th at p. 1139.) To negate malice, passion must obscure a defendant's reason " ' " 'to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation or reflection, and from such passion rather than from judgment.' " ' " (*Id.* at p. 1137.) Imperfect self-defense requires an actual if unreasonable belief in a need " 'to defend oneself from imminent peril to life or great bodily injury.' " (*In re Christian S.* (1994) 7 Cal.4th 768, 773.) If there is some evidence that a defendant charged with attempted murder was subject to such a passion, or sincerely perceived a need to defend himself, the prosecution must prove beyond a reasonable doubt that the defendant did *not* act in the heat of passion, and did *not* act with an actual belief in the need to defend himself with deadly force. (*People v. Rios*, *supra*, 23 Cal.4th at pp. 461–462; *Millbrook*, *supra*, at pp. 1136–1137.) If the prosecution fails to bear that burden, the defendant can be convicted only of attempted voluntary manslaughter.

1. *Substantial evidence supports the conviction.*

Hill argues that "[t]here is no reasonable interpretation of the facts other than that Hill acted in the heat of passion and in imperfect self-defense. Hill's actions took place virtually instantly and under the extreme stress of the gun battle, as plainly captured on a surveillance video." He points to his awareness that two men—Johnson and Monty B—had made threats against him. He emphasizes that he encountered Keesee within a second after fleeing from Johnson's gunfire and being grazed by two bullets. When he saw Keesee "running at me [from] the corner of my eye," he testified, he did not know if Johnson "had got[ten] up and was running at me shooting me or . . . ha[d] somebody else with him." Noting that the jury found that he had believed he needed to defend himself

from Johnson, or had been provoked by Johnson into a heat of passion, Hill contends that his state of mind could not have changed in the second before he saw Keesee. Even assuming that the jury's verdicts with regard to the shootings of Johnson and Keesee were inconsistent with regard to Hill's mental state, it would not follow that the latter verdict must be reversed for lack of substantial evidence. "[I]nconsistent verdicts are allowed to stand if the verdicts are otherwise supported by substantial evidence. '[A]ny verdict of guilty that is sufficiently certain is a valid verdict even though the jury's action in returning it was, in a legal sense, inconsistent with its action in returning another verdict of acquittal or guilt of a different offense.' " (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405, citing *People v. Lewis* (2001) 25 Cal.4th 610, 656.)

Hill also emphasizes that he had no reason to kill Keesee and that, after his first shot left Keesee lying helpless, he could easily have killed him had that been his intent. The prosecution, however, was not required to prove that Hill's motive was to cause Keesee's death. "[M]otive itself is not an element of a criminal offense," and "attempted murder [is] no exception." (*Smith*, *supra*, 37 Cal.4th at pp. 740–741.) "[T]he act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive . . . ." (*Id.* at p. 742.)

Nonetheless, "evidence of motive is often probative of intent to kill." (*Smith*, *supra*, 37 Cal.4th at p. 741) If a defendant had a *motive* to kill the victim, that fact supports an inference that, when the defendant performed an act likely to cause the victim's death, he did so with *intent* to kill. If imperfect self-defense is at issue, inquiry into motive is likely, for the prosecution rarely will have direct evidence for the negative proposition it bears the burden of proving, i.e., that the defendant did *not* act in a belief that he had to defend himself. One type of circumstantial evidence that can help prove that negative proposition is evidence that the defendant had a motive to try to kill the victim. Thus, while motive is not an element of attempted murder, evidence of motive is in many cases a crucial means of proving that a defendant did not act in self-defense. (See, e.g., *People v. Pertsoni* (1985)

172 Cal.App.3d 369, 375 ["Evidence of [defendant's] motive . . . was critically important in . . . rebutting his claim of self-defense."]; *People v. Mullen* (1953) 115 Cal.App.2d 340, 343 [in homicide case involving claim of self-defense, "motive is always material"].)

Before the gunfight began, Hill undisputedly had no motive to kill Keesee, a total stranger. The prosecutor argued, however, that Hill did have a motive when Keesee appeared in his path—to escape. As the video shows, Hill was fleeing the scene when he encountered Keesee running towards him. The prosecutor argued that he chose to remove Keesee, whom he perceived as an obstacle, by shooting him in the torso at close range.

Such an act "gives rise to an inference that the shooter acted with express malice." (*Smith, supra*, 37 Cal.4th at 742). In rejecting a contention of prosecutor misconduct, the Supreme Court in *People v. Arias* (1996) 13 Cal.4th 92, 162 observed, "The prosecutor merely illustrated the correct principle that if the jury found defendant's use of a lethal weapon with lethal force was purposeful, an intent to kill could be inferred, even if the act was done without advance consideration and only to eliminate a momentary obstacle or annoyance." Referring to that observation, the court in *Smith* explained: "The point is that where the act of purposefully firing a lethal weapon at another at close range gives rise to an inference of intent to kill, that inference is not dependent on a further showing of any particular *motive* to kill the victim. This follows from the principle that motive is generally not an element of a crime in the first instance, including the crimes of murder and attempted murder. One may kill with or without a motive and still be found to have acted with express malice." (*Smith*, at pp. 741–742.) It does not matter that Hill "fired only once and then abandoned his efforts out of necessity or fear," or that Keesee "escaped death because of the shooter's poor marksmanship." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) The video shows that Hill looked squarely at Keesee and shot him. Based on the video the jury could reasonably find that Hill did not shoot Keesee in the mistaken belief that he had to defend himself, or in a fit of passion, but that he did so with the aim of removing an obstacle to his immediate escape. Hill's challenge to the sufficiency of the evidence thus fails.

2. *Hill has not shown prejudicial instructional error.*

Hill contends that the court erred in using CALCRIM No. 600 to define attempted murder because that instruction does not state every element of the crime. It asks if the defendant (1) intended to kill a person and (2) took a direct but ineffectual step toward doing so, but it does not state the necessity of finding the absence of heat of passion and of imperfect self-defense. Hill cites a Supreme Court dissent asserting that jury instructions that fail to require the *absence* of those two circumstances "are incomplete instructions on the element of malice." (*People v. Breverman* (1998) 19 Cal.4th 142, 189–190 [dis. opn. of Kennard, J.].) But the trial court here completed the instructions with CALCRIM Nos. 603 and 604, which unequivocally told the jury that the prosecution bore the burden of proving the absence of heat of passion and the absence of imperfect self-defense, as well as with CALCRIM No. 200, which told the jury to consider all instructions together. In assessing whether an instruction was erroneous, we "look to the instructions as a whole." (*People v. Franco* (2009) 180 Cal.App.4th 713, 720.) The instructions as a whole were correct.

Hill also contends that the court erred by using CALCRIM No. 603, which has a patent omission: it states that, for heat of passion to reduce attempted murder to attempted voluntary manslaughter, "the defendant must have acted under the direct and immediate influence of provocation *as I've defined it*" (italics added), yet it never defines "provocation." No other instruction supplied the missing definition of "provocation." Hill contends the omission was prejudicial because the jury likely assumed that Keesee's conduct could constitute "provocation" only if Keesee intended to threaten Hill, which clearly was not the case.[1] Hill contends the court should have instructed the jury that provocation can include "conduct reasonably believed by the defendant to have been

[1] Although Hill's brief emphasizes the notable gap in CALCRIM No. 603, i.e., its failure to define "provocation," his argument does not attribute any prejudice to that omission. The only prejudice Hill claims arises from the failure to clarify the perspective from which provocation is assessed—i.e., not from the perspective of the victim, but from that of a reasonable person in the defendant's position.

engaged in by the victim," regardless of the victim's actual conduct or intent. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583, citing *People v. Brooks* (1986) 185 Cal.App.3d 687, 694.) We question whether the jury would have understood "provocation" to have as limited a meaning as Hill suggests. In all events, Hill did not object to the instruction or request that the court provide a definition of "provocation" that would explain that provocation must be assessed from the perspective of the defendant rather than the victim. He did not request a "pinpoint instruction" relating the particular facts of the case to the elements of the offense, and the court had no sua sponte obligation to give one. (*People v. Rogers* (2006) 39 Cal.4th 826, 877–880; *People v. Garvin* (2003) 110 Cal.App.4th 484, 488–489; *People v. Middleton* (1997) 52 Cal.App.4th 19, 30–31, disapproved on other ground by *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.)

Furthermore, any conceivable error in this respect was harmless.[2] The record reveals no reasonable probability that the jury would have convicted Hill of attempted voluntary manslaughter, based on heat of passion, had it been instructed that "provocation" can be based on "conduct reasonably believed by the defendant to have been engaged in by the victim." (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 583.) The jury found that Hill did not act in imperfect self-defense. Under the instruction on self-defense, the jury necessarily found that Hill did not believe he was in imminent danger requiring the immediate use of deadly force to defend against the danger. The self-defense instruction required the prosecution to prove that Hill did not *actually* perceive Keesee as a threat; the heat-of-passion instruction that Hill now argues should have been given would have required proof that Hill did not *reasonably* perceive Keesee's conduct as a threat. Because the jury found beyond a reasonable doubt that Hill did not actually

[2] Hill contends that the claimed error is of federal constitutional dimension because it deprived him of his right to present a defense and right to a jury trial. However, were there an error, failing to have clarified the perspective from which the jury must assess provocation would be an error of state law, the prejudicial effect of which would be assessed under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Flood* (1998) 18 Cal.4th 470, 487.)

perceive Keesee as a threat, it necessarily would not have found that he reasonably perceived his conduct as a threat even if the additional instruction had been given.

3. *The prosecutor did not commit prejudicial misconduct.*

Hill contends that the prosecutor committed misconduct in her rebuttal by shifting the burden of proof to him on the issues of self-defense and heat of passion, and that either this misconduct amounts to prejudicial error, or his trial counsel's failure to object amounts to ineffective assistance.

Prosecutorial misconduct " ' "violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) If conduct does not render a trial "fundamentally unfair," it qualifies as prosecutorial misconduct under California law "if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*Ibid.*) A defendant "may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety." (*Ibid.*)

The prosecutor began her rebuttal as follows: "This case is about attempted murder. . . . [W]e start . . . with attempted murder. In order to get off attempted murder, there has to be additional information . . . about [perfect] self-defense or . . . imperfect self-defense or . . . heat of passion." The prosecutor later rhetorically asked, "How do you have to get to self-defense? . . . to imperfect self-defense? . . . to heat of passion? Did you listen to [defense counsel's] argument? Well, the defendant said, he said this and so that gets you away from attempt[ed] murder and . . . into another area like self-defense. The defendant said this. The defendant said that." The prosecutor then said, "the defendant is not credible . . . and because of that, you don't need to go there." Finally, the prosecutor said that "in order to get off that attempt[ed] murder charge and get to [perfect] self-defense or get to attempt[ed] voluntary manslaughter, *you need to believe the defendant*." (Italics added.) These comments, Hill contends, informed the jury that it could find him guilty of

attempted voluntary manslaughter, and not attempted murder, only if it believed his testimony, thus shifting to him the burden of proof regarding imperfect self-defense and heat of passion.

These remarks were not entirely inaccurate. The comment that "to get off attempted murder, there has to be additional information . . . about [perfect] self-defense or . . . imperfect self-defense or . . . heat of passion" correctly stated the law: the prosecution must disprove self-defense or heat of passion only if there is some evidence—offered by either side—that the defendant may have been provoked, or may have perceived danger. (*People v. Rios*, *supra*, 23 Cal.4th at pp. 461–462.) Nor was it improper to urge the jury not to credit defendant's testimony. Although the prosecution bore the burden of proof on self-defense and heat of passion, it does not follow that the prosecutor could not attack the credibility of Hill's testimony supporting those claims. (See, e.g., *People v. Marquez* (1992) 1 Cal.4th 553, 575–576.)

However, the prosecutor misstated the law when she added, ". . . and because of that, you don't need to go there [i.e., self-defense or heat of passion]," and stated, "in order to get off that attempt[ed] murder charge . . . you need to believe the defendant." Even if the jury did not find Hill credible, it could still "get to attempted voluntary manslaughter," i.e., find that the prosecution had failed to prove beyond a reasonable doubt that Hill did *not* act in imperfect self-defense or the heat of passion. Based solely on the videos, the jury could have harbored reasonable doubts as to whether Hill had mistakenly seen Keesee as a threat and shot him in self-defense or unreasoning panic.

Nonetheless, Hill forfeited this issue by not objecting or requesting an admonition. Hill contends that an objection would have been futile because it would have emphasized the prosecutor's implication and suggested concern about Hill's credibility. But there is no basis to believe that an objection would not have clarified any possible misunderstanding. The prosecutor herself twice stated unequivocally in her closing that the People bore the burden of proving that Hill did not act in self-defense or the heat of passion. The prosecutor added that she did not mean to misquote the law or misdirect the jury, and urged them to review the instructions, which correctly described the burden of

proof. If defense counsel had objected to the improper comments, the court likely would have admonished the jury as to the burden of proof, and the jury would have perceived the exchange as simply correcting a misstatement.

In all events, given the prosecutor's express acknowledgment of the People's burden of proof on those issues, her inaccurate comments were not part of a pattern of egregious misconduct amounting to a denial of due process. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Her isolated misstatements were not a deceptive method of persuading the jury. Moreover, there is no reasonable probability of a different result absent those particular statements. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820–821, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 835.) Not only did the prosecutor state twice in her closing argument that the People bore the burden of proving that Hill did not act in self-defense or the heat of passion, defense counsel repeatedly echoed that principle in her closing and the court instructed the jury that the People bore the burden of proving those propositions beyond a reasonable doubt. The prosecutor also urged jurors to review and rely on the court's instructions, and those instructions told the jury that, if the "attorneys' comments on the law" conflicted with the court's instructions, the jury must follow the latter. There is no reason to doubt that the jury followed those instructions.

Disposition

The judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.

APPENDIX A

Frame 1

Frame 2 :

Frame 3

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